Supreme Court, U. S.
FILED
SEP 19 1980
MICHAEL RODAK, JR., CLERK

No. 80-17

In the Supreme Court of the United States

OCTOBER TERM, 1979

ERNEST L. BOWERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that he was indicted under the wrong statute and that the trial court erred in failing to rule on a jury instruction that he had requested prior to closing arguments.

After a jury trial in the United States District Court for the Eastern District of Washington, petitioner was convicted on two counts of willfully attempting to evade federal taxes, in violation of 26 U.S.C. 7201 (Pet. App. A-1). The district court sentenced him to a two-year term of imprisonment on each count, the sentences to run concurrently. The court of appeals affirmed (Pet. App. A-3).

Through his wholly owned corporation, Fatty Copperfield, Inc., petitioner operated and controlled Fatty Copperfield's, a restaurant in Spokane, Washington (Pet. 3). The indictment charged that petitioner had knowingly and willfully attempted to evade and defeat assessment of taxes owed by Fatty Copperfield, Inc., for the third (Count I) and fourth (Count II) quarters of 1974. At trial, the government introduced evidence showing that a tax return for the third quarter of 1974 had been prepared by an accounting firm and delivered to the petitioner (Tr. 187-188, 350). Petitioner was aware of the time within which the return was required to be filed (*ibid.*). Although the return revealed both the FICA taxes due and the income taxes that had been withheld from the wages of Fatty Copperfield's employees, petitioner failed to file the return (Tr. 187-188, 350, 418).[1] Nor did petitioner file a return for the fourth quarter of 1974 (Tr. 418).

The government's evidence demonstrated that petitioner had attempted to conceal his operation and control of Fatty Copperfield's from the Internal Revenue Service (Tr. 445-449). Petitioner's wife testified that he had told her that he kept two sets of books for the business (Tr. 309-310). The evidence also showed that petitioner removed the books and records of Fatty Copperfield's to his home, told his wife that he intended to burn them, and, in fact, burned some of the records when he abandoned the business and left Spokane, Washington (Tr. 308-309, 271-272). One of the former employees of Fatty Copperfield's testified that petitioner took approximately $1,000 each week from the cash

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[1]The third quarter return was prepared for petitioner's signature by typing his name on the return, but petitioner instructed an employee to remove his name from the return (Tr. 351-352).

register (Tr. 349).[2] Petitioner nevertheless told the Internal Revenue Service agent who investigated the case that he was just an employee of Fatty Copperfield's (Tr. 445-446), that he took no cash from the restaurant till (Tr. 450), that he did not discuss the taxes involved here with an accountant (Tr. 452-453), and that he did not keep any corporate records at his home (Tr. 450).[3]

1. Petitioner argues (Pet. 4-5) that he should have been charged with a violation of 26 U.S.C. 7202,[4] rather than 26 U.S.C. 7201.[5] That contention is frivolous. *E.g., United*

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[2]Another witness testified that petitioner regularly carried large sums of cash (Tr. 300). Petitioner told an acquaintance that the restaurant "did real well" and that he had left Spokane owing the government more than $250,000 in taxes (Tr. 225, 228, 230).

[3]In addition, there was evidence that a number of employees of Fatty Copperfield's were never given copies of Form W-2 for 1974 (Tr. 329). A Form W-2 is a wage and earnings statement for the year, which shows, *inter alia*, the amount of income tax and FICA tax withheld from wages. The employer is required to file one copy of each Form W-2 with the government (26 C.F.R. 31.6051-2(a)).

[4]Section 7202 provides as follows:

> Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

[5]Section 7201 provides as follows:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

States v. *Batchelder,* 442 U.S. 114, 124 (1979); *Bordenkircher* v. *Hayes,* 434 U.S. 357, 364 (1978). As this Court recently explained, a criminal "defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution" (*United States* v. *Batchelder, supra,* 442 U.S. at 125). That petitioner would have had a better chance of acquittal if he had been charged under 26 U.S.C. 7202 is of no constitutional significance.[6]

2. Petitioner also argues (Pet. 6-7) that the trial court erred in failing to indicate prior to closing arguments that it did not intend to give an instruction he had requested regarding willfulness. Prior to closing arguments, the trial court indicated it would give the following instruction (Tr. 618):

> To establish willfulness, the government must establish beyond a reasonable doubt that at the time payment was due, the taxpayer possessed sufficient funds to enable him to meet his obligation, or that the lack of sufficient funds on such date was created by or was the result of a voluntary and intentional act without justification in view of all the financial circumstances of the taxpayer.

After closing arguments (Tr. 632), however, the court, upon motion of the government (Tr. 647), informed counsel that this instruction would not be read (Tr. 648-649). Instead the court instructed the jury as follows (Tr. 675-676):

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[6]Since the evidence in this case was more than sufficient to support the jury's inference of a willful attempt to evade and defeat taxes, this Court's decision in *Spies* v. *United States,* 317 U.S. 492 (1943), does not suggest a contrary result.

An attempt to evade or defeat a tax must be a willful attempt. That is to say, it must be an attempt made voluntarily and intentionally with the specific intent to keep from the government a tax imposed by the income tax laws, which is the legal duty of the accused to pay to the government, and which the accused knew it was his legal duty to pay.

* * * * *

An act or failure to act is willfully done if it's done voluntarily and intentionally, and with the specific intent to do something the law forbids, or the specific intent to fail to do something the law requires to be done. * * *

To establish the crime of income tax evasion as charged in the Indictment, the prosecution must prove beyond a reasonable doubt that the defendant willfully attempted to evade or defeat a tax due the government. This involves a specific intent to evade the tax and some willful commission of affirmative—or affirmative action by the defendant in furtherance of that intent.

By way of illustration only, a willful intent may be inferred from a consistent pattern of understatement of income, or for such conduct as the destruction or falsification of books or records, the maintenance of a double set of books, * * * the concealment of assets or income, or such other conduct which would be likely to mislead or conceal.[7]

Were you to find that the defendant acted willfully, as used in these instructions, the government must have shown beyond a reasonable doubt that the

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[7]See *Spies* v. *United States, supra,* 317 U.S. at 499.

> defendant voluntarily and intentionally violated a known legal duty as discussed in these instructions.

Contrary to petitioner's claim, no error resulted from this sequence of events.

The closing arguments were not transcribed (Tr. 632). It is thus impossible to determine whether the argument of petitioner's counsel was structured in reliance upon the instruction the court had indicated it would give.[8] Even if it is assumed that petitioner's counsel relied upon the trial court's proposed instruction to argue that petitioner had not acted willfully because, through no fault of his own, he lacked the ability to pay the tax, petitioner cannot contend under the circumstances of this case that this resulted in prejudice to him. Petitioner was charged with violating 26 U.S.C. 7201 by willfully attempting to defeat and evade the assessment of federal taxes. See *United States* v. *Jannuzzio,* 184 F. Supp. 460, 465 (D. Del. 1960). A defendant's financial circumstances are no justification for willful and affirmative actions undertaken to hide tax liability from the government. An excusable inability to pay the tax or an intent to pay the tax at some time in the future does not detract from the criminality of willful acts defeating the assessment of the tax. See *Sansone* v. *United States,* 380 U.S. 343, 354 (1965). Accordingly, petitioner was not entitled under the circumstances of this case to defend against the charges against him on the basis that he lacked the ability to pay the taxes.[9] He was thus not

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[8]It should be noted, however, that petitioner contends (Pet. 4) that he "heavily relied" on his asserted lack of funds to pay the taxes "throughout the trial." His "defense of lack of funds" would therefore have been no less "effectively scuttled" had the trial court ruled correctly on his request for this instruction before the closing arguments.

[9]Petitioner appears to concede in connection with his first argument (Pet. 4-5) that lack of funds is not a defense to a charge of attempted tax evasion.

entitled to the instruction the court initially indicated it would give and the trial court's subsequent refusal to give that instruction was clearly correct. Allowing petitioner to assert this defense in his closing argument gave him more than he was entitled to.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1980

DOJ-1980-09